Supreme Court, U.S.
FILED
SEP 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-275

# In the Supreme Court of the United States

OCTOBER TERM, 1989

COOTER & GELL, PETITIONER

*v.*

HARTMARX CORPORATION, ET AL., RESPONDENTS

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

RICHARD J. FAVRETTO *
MARK W. RYAN
EVAN M. TAGER
*Mayer, Brown & Platt*
*2000 Pennsylvania Avenue, N.W.*
*Washington, D.C. 20006*
*(202) 463-2000*
*Attorneys for Respondents*

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

30 pp

## QUESTIONS PRESENTED

1. Whether, by voluntarily dismissing its complaint pursuant to Fed. R. Civ. P. 41(a)(1)(i), petitioner deprived the district court of jurisdiction to act on a motion for Rule 11 sanctions that was filed before the voluntary dismissal.

2. Whether the court of appeals, which determined that petitioner's admitted failure to conduct any inquiry with respect to fundamental allegations of the complaint was unreasonable under the circumstances of this case, applied an improper standard in reviewing the district court's decision that Rule 11 had been violated.

3. Whether the district court abused its discretion in finding that petitioner violated Rule 11 by filing a complaint that had no reasonable basis in fact or in imposing a sanction of $21,402.52 against petitioner.

4. Whether the court of appeals correctly determined that the district court should award respondents attorney's fees reasonably incurred in successfully defending against petitioner's appeal of the Rule 11 judgment.

## PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

In addition to respondent Hartmarx Corporation, respondents include two wholly-owned subsidiaries of Hartmarx Corporation, Hart, Schaffner & Marx and Hickey-Freeman Co., Inc. Hartmarx Corporation has no parent companies, affiliates or subsidiaries (except wholly-owned subsidiaries).

## TABLE OF CONTENTS


| | Page |
|---|---|
| STATEMENT OF THE CASE | 1 |
| A. The Repeated Antitrust Suits Against Hartmarx and Its Subsidiaries | 2 |
| B. Cooter & Gell's Pre-Filing Inquiry In This Case | 4 |
| C. The Decision of the District Court | 8 |
| D. The Decision of the Court of Appeals | 10 |
| REASONS FOR DENYING THE PETITION | 12 |
| CONCLUSION | 25 |


## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Balfour Guthrie, Inc.* v. *Hunter Marine Transp., Inc.*, 118 F.R.D. 66 (M.D. Tenn. 1987) | 17 |
| *Barr Laboratories, Inc.* v. *Abbott Laboratories*, 867 F.2d 743 (2d Cir. 1989) | 17 |
| *Basch* v. *Westinghouse Elec. Corp.*, 777 F.2d 165 (4th Cir. 1985), cert. denied, 476 U.S. 1108 (1986) | 21, 23 |
| *Carter* v. *United States*, 547 F.2d 258 (5th Cir. 1977) | 13 |
| *Community Elec. Serv., Inc.* v. *National Elec. Contractors Ass'n, Inc.*, 869 F.2d 1235 (9th Cir. 1989) | 18 |
| *Connecticut* v. *Insurance Co. of America*, 121 F.R.D. 159 (D. Conn. 1988) | 17 |
| *D & M Orthotics & Prosthetics, Inc.* v. *Sisters of Mercy Health Corp.*, No. 88-1945 (6th Cir. June 5, 1989) (1989 U.S. App. LEXIS 7865) | 18 |
| *Environmental Defense Fund, Inc.* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982) | 24 |
| *Greenberg* v. *Sala*, 822 F.2d 882 (9th Cir. 1987) | 13 |

Cases—Continued — Page

*Hays* v. *Sony Corp. of America*, 847 F.2d 412 (7th Cir. 1988) ..... 21, 23
*In re Pine*, 705 F.2d 936 (7th Cir. 1983) ..... 24
*Johnson Chem. Co.* v. *Home Care Prods., Inc.*, 823 F.2d 28 (2d Cir. 1987) ..... 13, 14
*Jones* v. *MacMillan Bloedel Containers, Inc.*, 685 F.2d 236 (8th Cir. 1982) ..... 24
*Kurkowski* v. *Volcker*, 819 F.2d 201 (8th Cir. 1987) ..... 13, 14
*Muthig* v. *Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988) ..... 13, 21
*NCAA* v. *Board of Regents*, 468 U.S. 85 (1984) ..... 20
*Orange Production Credit Ass'n* v. *Frontline Ventures, Ltd.*, 801 F.2d 1581 (9th Cir. 1986) ..... 21, 23
*Santiago* v. *Victim Servs. Agency*, 753 F.2d 219 (2d Cir. 1985) ..... 14, 15
*Schauffler* v. *United Ass'n of Journeymen & Apprentices*, 246 F.2d 867 (3d Cir. 1957) ..... 24
*Short* v. *Weinrebe*, No. 87-5057 (E.D. Pa. June 30, 1988) (1988 U.S. Dist. LEXIS 6515) ..... 17
*Smith* v. *Phillips*, No. 89-6056 (10th Cir. Aug. 2, 1989) (1989 U.S. App. LEXIS 11047) ..... 17
*Szabo Food Serv., Inc.* v. *Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), cert. dismissed, 108 S. Ct. 1101 (1988) ..... 13, 15, 16
*Tamari* v. *Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469 (7th Cir. 1984) ..... 22, 24
*Westmoreland* v. *CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985) ..... 11, 23
*Williams* v. *Ezell*, 531 F.2d 1261 (5th Cir. 1976) ..... 13

Statutes and Rules

Civil Rights Attorney's Fees Award Act
42 U.S.C. § 1988 ..... 15, 24
Fed. R. Civ. P.
11 ..... *passim*
37 ..... 22, 24
41(a)(1)(i) ..... 8, 13, 15, 16, 17
41(a)(1)(ii) ..... 17

# In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-275

COOTER & GELL, PETITIONER

*v.*

HARTMARX CORPORATION, ET AL., RESPONDENTS

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### STATEMENT OF THE CASE

The district court imposed Rule 11 sanctions in this case because petitioner Cooter & Gell failed to conduct an adequate pre-filing inquiry into the factual basis for the allegations contained in an antitrust lawsuit filed against respondents Hartmarx Corporation, Hart, Schaffner & Marx and Hickey-Freeman Co., Inc. The reprimand followed years of related litigation between a Cooter & Gell client and Hartmarx and its subsidiaries. During those years, Cooter & Gell initiated four separate antitrust actions against various Hartmarx companies, none of

which resulted in a finding that Hartmarx or any of its subsidiaries had violated the antitrust laws. As the district court observed, it had "tasted the flavor of the litigation" and was "in the best position" to determine whether, as Rule 11 requires, Cooter & Gell had performed a reasonable investigation into the factual basis for its client's complaint in this case. Pet. App. 23a. A unanimous court of appeals found "no difficulty in affirming liability under Rule 11 here." *Id.* at 11a. Because the petition fails to afford the Court a fair view of the conduct that led to the imposition of Rule 11 sanctions, a brief summary of the record follows.

**A. The Repeated Antitrust Suits Against Hartmarx and Its Subsidiaries**

Petitioner Cooter & Gell is a law firm based in Washington, D.C. Respondent Hartmarx is a holding company that manufactures and distributes men's clothing across the United States through various subsidiaries, including respondents Hickey-Freeman and Hart, Schaffner & Marx. For approximately three years, petitioner represented a Washington area clothing retailer, Danik, Inc., in four antitrust actions brought against Hartmarx and five Hartmarx affiliates.

The flurry of antitrust litigation followed in the wake of a breach of contract action against Danik by Hartmarx's subsidiary, Intercontinental Apparel, Inc. Intercontinental alleged that Danik had failed to pay for approximately $100,000 of merchandise. Cooter & Gell, on behalf of Danik, filed a counterclaim alleging that Intercontinental had engaged in price discrimination in violation of the Robinson-Patman Act. In March 1984, the district court



granted Intercontinental summary judgment on its breach of contract claim, and that judgment was affirmed on appeal. In February 1985, a jury returned a verdict for Intercontinental on Danik's Robinson-Patman Act counterclaim. The court of appeals again affirmed. Pet. App. 2a.

In November 1983, while the litigation described above was proceeding in district court, Cooter & Gell prepared two different class action complaints against Hartmarx and several of its subsidiaries. Pet. App. 2a-3a. Cooter & Gell presented drafts of those complaints to counsel for Hartmarx and promised to file both lawsuits unless the breach of contract action against Danik was settled on terms that resulted in a payment to Danik. *Id.* at 3a. Cooter & Gell's lead attorney recounted his ultimatum in an affidavit filed in the district court (C.A. App. 183) [1]:

> I made clear at that meeting * * * with counsel for [Hartmarx], that it was not my intention to simply "wash out" the collection with my forebearance in filing these class actions. I stated to counsel that I felt that [Hartmarx] faced more exposure from these class actions than did my client in the underlying collection suit, and that it was my intention to give [Hartmarx] an opportunity to consider settlement of the class action suits prior to the certification of the class actions, after which time I would no longer be able to engage in settlement discussions on my client's behalf alone.

Hartmarx rejected Danik's "settlement offer" and, true to its word, Cooter & Gell filed the two class ac-

---

[1] "C.A. App." refers to the joint appendix submitted to the court of appeals.

tion complaints. Pet. App. 3a. Both lawsuits were assigned to Judge Oliver Gasch, who was presiding over the original breach of contract/Robinson-Patman Act litigation. Thus, at the end of 1983, Cooter & Gell was representing Danik against Hartmarx and its affiliates in three separate lawsuits before the same district judge.[2] Danik voluntarily dismissed both class actions (prior to class certification) at the end of April 1984. See C.A. App. 3.

In September 1984, Cooter & Gell filed yet another antitrust action against three Hartmarx subsidiaries and an unrelated clothing retailer in the United States District Court for the District of Maryland. The Maryland court granted Hartmarx's motion to transfer the action to Judge Gasch on the ground that the issues raised in the complaint were identical or substantially identical to the issues in the antitrust lawsuits described above. The action was then stayed pending final resolution of the original breach of contract/Robinson-Patman Act litigation and was ultimately dismissed voluntarily in July 1986.

**B. Cooter & Gell's Pre-Filing Inquiry In This Case**

The complaint that gave rise to the district court's ruling that Cooter & Gell violated Rule 11 was one of the two class action complaints filed in November

[2] In its petition, Cooter & Gell refers to only one of the two class action complaints it filed against Hartmarx—the complaint that resulted in Rule 11 sanctions. Petitioner's statement that, in late 1983, "Danik had two antitrust actions pending in the district court against Hartmarx Corporation and its subsidiaries" (Pet. 4) is therefore incorrect. As described above, there were three antitrust actions pending at that time (the two class actions and the Robinson-Patman Act counterclaim).



1983. That complaint alleged that Hartmarx was engaged in a massive nationwide antitrust conspiracy involving price-fixing, resale price maintenance, territorial exclusivity, and other "unfair competition practices." Pet. App. 20a. The factual premise of the entire complaint was the allegation that Hartmarx sold Hart, Schaffner & Marx and Hickey-Freeman suits to only "one retailer in each major metropolitan area in the United States." *Id.* at 19a. The complaint was signed by two attorneys from Cooter & Gell and was verified by Danik's president and principal owner.

Apart from the fact that exclusive dealerships are a common method of distributorship in a variety of industries and are perfectly legal under federal antitrust laws, the allegations that Hartmarx systematically employed exclusive dealers was completely false. Affidavits from Hart, Schaffner & Marx and Hickey-Freeman executives filed with respondents' motion to dismiss the complaint demonstrated that "Hart, Schaffner and Marx suits are distributed to more than one retailer in each of fifteen major metropolitan areas save Washington, D.C.," and that "except in Washington, D.C. and Baltimore, Maryland, Hickey-Freeman suits are sold to more than one retailer in each of the same fifteen major metropolitan areas." Pet. App. 21a. "Indeed, these executives reported that each brand was sold to as many as 20 different retailers in some markets." *Id.* at 4a. The affidavits further established that neither Hart, Schaffner & Marx nor Hickey-Freeman had exclusive dealership agreements with any of their respective retailers. *Id.* at 21a.

Five days after moving to dismiss the complaint, Hartmarx moved for sanctions under Rule 11. In

opposing the Rule 11 motion, Cooter & Gell submitted two affidavits that described the firm's pre-filing inquiry. Pet. App. 4a. In addition, counsel for Hartmarx (over the objections of Cooter & Gell) took the deposition of the Danik officer who had verified the complaint and inquired into what facts he knew that supported his verification. As the district court found, the officer "stated that he relied wholly upon the representations of [Cooter & Gell] and conducted no independent review of the factual allegations of the complaint." Pet. App. 21a. In other words, this case does not involve a situation where an attorney relied on the misguided assertions of a client in drafting the factual allegations of a complaint and was then confronted with Rule 11 proceedings. Just the opposite is true; petitioner presented its client with unfounded accusations against Hartmarx and the client then signed off on those accusations.

According to the Cooter & Gell affidavits, at some time after the original breach of contract litigation began, the firm "became aware of the possible existence of an exclusive retail agent policy" whereby Hartmarx sold its Hart, Schaffner & Marx and Hickey-Freeman lines of men's suits through one exclusive retail agent in Washington, D.C. Pet. App. 22a. Cooter & Gell's "aware[ness]" of the "possible existence" of such a policy was based solely on the fact that only one retailer (Raleighs) sold these lines of menswear in the Washington area and that, according to unnamed principals at Danik, Danik had been unable to purchase such menswear from Hartmarx. *Ibid.* Wishing to turn this speculation into a cause of action, Cooter & Gell initiated an investigation into the existence of a nationwide exclusive



agency and price maintenance policy in the sale of men's suits under the Hart, Schaffner & Marx and Hickey-Freeman labels. That investigation began and ended with a series of telephone calls to salesmen at a few randomly selected clothiers in Washington, D.C., Baltimore, Philadelphia and New York. *Id.* at 4a, 22a.

In each of those calls, which were placed either by an attorney or a secretary at Cooter & Gell, the salesman purportedly said that he knew of only one retailer in his city that sold Hart, Schaffner & Marx suits. Pet. App. 22a. In none of the calls did the salesman say anything to suggest that the lack of additional Hart, Schaffner & Marx outlets was the result of an exclusive dealer policy. Moreover, in none of the calls was the salesman asked anything about the number of Hickey-Freeman outlets in his city; in none was he asked anything about a refusal by Hartmarx to deal with any retailers; in none was he asked about any restrictions on the territory in which Hartmarx authorized its retailers to sell its products; and in none was he asked anything about the prices at which Hart, Schaffner & Marx or Hickey-Freeman suits were sold in his city. *Id.* at 5a, 24a-25a. Despite its desire to establish that Hartmarx had an anticompetitive policy of nationwide scope, Cooter & Gell made no phone calls to retailers outside Washington, Baltimore, Philadelphia and New York. *Id.* at 5a, 22a-23a.

After it obtained the Hart, Schaffner & Marx and Hickey-Freeman affidavits that gave the lie to the allegations of the complaint, Cooter & Gell might have acknowledged its error and withdrawn the complaint. Instead, the law firm chose to conduct an additional

"investigation." It consisted of a review of telephone directories in various major cities and additional phone calls to salesmen, asking whether Hartmarx had "an exclusive retailer agent policy" for the sale of Hart, Schaffner & Marx and Hickey-Freeman suits. Even that skimpy investigation revealed that multiple retailers existed for Hartmarx menswear in Los Angeles, Boston and Philadelphia, one of the four cities encompassed by Cooter & Gell's original investigation.[3] Despite confirming what the Hart, Schaffner & Marx and Hickey-Freeman affidavits had established—that the fundamental factual premise of the complaint was wrong—Cooter & Gell and its client opposed Hartmarx's motion to dismiss (and, of course, the Rule 11 motion). Litigation of the unfounded claims contained in the complaint continued for three months before the complaint was voluntarily dismissed pursuant to Fed. R. Civ. P. 41(a)(1)(i).

**C. The Decision of the District Court**

Six weeks after the complaint was voluntarily dismissed, the district court held a hearing on the Rule 11 motion. In December 1987, the court ordered Hartmarx to submit a statement of costs and attorney's fees. Cooter & Gell and Danik (now represented by other counsel) separately filed objections to the fee request and reiterated their arguments as to why the court should deny the Rule 11 motion. In February 1988, the court granted the motion, holding that the "pre-filing inquiry into the facts underlying these allegations was grossly inadequate." Pet. App. 23a. The court awarded Hartmarx a total of

[3] Cooter & Gell's post-filing inquiry is described in an affidavit contained at C.A. App. 146-150.



$32,103.78 in costs and attorney's fees.[4] It assessed two-thirds of the award ($21,402.52) against Cooter & Gell and the remainder ($10,701.26) against Danik. *Id.* at 29a.

With respect to the claim that Hartmarx maintained exclusive agreements with one retailer in every major metropolitan area in the United States, the district court found two "obvious deficiencies" in Cooter & Gell's pre-filing inquiry. Pet. App. 23a. "First, it concentrated solely upon Hart, Schaffner & Marx menswear and thus in no way justified the claim of exclusive retail agency arrangements for Hickey-Freeman apparel. Second, it was limited to four eastern cities and consequently provides no support for the allegation that exclusive arrangements existed in *every* major metropolitan area." *Ibid.* (emphasis in original). In addition, the court took Cooter & Gell to task for the meager nature of its investigation within those four cities. Specifically, the law firm "contacted only a few retailers in cities where dozens of retailers were in business" and directed its telephone calls to salesmen, without attempting to contact "management personnel who might have personal knowledge of the alleged exclusive retail agency policy." *Id.* at 24a.

The district court also pointed out that, even if Hartmarx had been party to exclusive dealing agreements, such agreements "by themselves, are not per se violations of antitrust laws." Pet. App. 24a. Exclusive dealing arrangements are analyzed under the "rule of reason" and can give rise to liability only if an antitrust plaintiff is able "to plead, and show,

[4] Hartmarx had submitted a verified fee request showing attorney's fees and costs totalling $61,917.99.

anticompetitive effects" flowing from the arrangements. *Ibid.* The court found that Cooter & Gell "failed to make any investigation whatsoever into the factual basis" for a claim that Hartmarx's distribution policies had brought about the anticompetitive effects necessary to prove an antitrust violation. *Ibid.*

**D. The Decision of the Court of Appeals**

On appeal, Cooter & Gell argued for the first time that the voluntary dismissal of Danik's complaint had stripped the district court of jurisdiction to rule on Hartmarx's Rule 11 motion.[5] The court of appeals rejected that argument, explaining:

> Rule 11 sanctions * * * are * * * meant to deter the filing of unfounded pleadings, which is an abuse of the judicial process. As in criminal contempt, the court has an interest in deterring such conduct independent of the burdened party's interest in recovering its expenses. Accordingly, a court may award Rule 11 sanctions or issue a contempt citation *sua sponte*. * * * In revelant respects, therefore, Rule 11 is analogous to criminal contempt; the systemic interest in its proper functioning requires that it be available in appropriate circumstances notwithstanding a private party's effort to cut its losses and run out of court, using Rule 41 as an emergency exit.

Pet. App. 9a-10a.

The court of appeals also reviewed the record that established Cooter & Gell's liability under Rule 11.

---

[5] Danik separately appealed the Rule 11 judgment against it, but that appeal was dismissed for failure to prosecute. Pet. App. 2a.



Like the district court, it accepted Cooter & Gell's own "account of their efforts" prior to filing the complaint. Pet. App. 11a. And that account was enough to demonstrate the law firm's liability to Hartmarx: "It is impossible to see how 'no inquiry' could be a 'reasonable inquiry' with regard to the Hickey-Freeman allegation or how, without more, an inquiry into four proximate markets could sustain an inference regarding practices elsewhere." *Ibid.* Because those deficiencies went "to the heart of the complaint," the court below found it unnecessary to consider whether Rule 11 was violated by Cooter & Gell's failure to inquire into the anticompetitive effects essential to a rule of reason claim. *Id.* at 13a.

In addition, the court of appeals rejected Cooter & Gell's contention that the district court abused its discretion in setting the amount of the sanction. Inasmuch as the sanction totalled only about one-half of "the costs and attorney's fees incurred by [Hartmarx]" as a result of the baseless complaint, the court of appeals saw no reason to "justify our finding [the district court's] decision an abuse of discretion." Pet. App. 13a-14a.

Finally, the court of appeals agreed with Hartmarx that it was entitled to return to the district court and request an additional award for attorney's fees reasonably incurred in defending the Rule 11 award on appeal. Borrowing from its earlier decision in *Westmoreland* v. *CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985), the court noted that "[i]t is very possible that appellate expenses might exceed substantially the sanction in the district court, thus forcing many litigants in [Hartmarx's] position to conclude that the vindication of the Rule 11 interests is not worth the

candle." Pet. App. 14a. Accordingly, the court of appeals remanded the case to the district court for the limited purpose of determining the amount of additional fees due Hartmarx. *Id.* at 16a.

**REASONS FOR DENYING THE PETITION**

This case involves petitioner's blatant violation of Rule 11 of the Federal Rules of Civil Procedure. Rule 11 clearly requires that every pleading must "to the best of the signer's knowledge, information, and belief formed after reasonable inquiry" be "well grounded in fact," and it forbids pleadings to be "interposed for any improper purpose." Both lower courts, after a careful review of the record, agreed that petitioner filed a lawsuit charging respondents with serious antitrust violations without making even the slightest genuine effort to determine whether the allegations in the complaint had any basis in fact. And both lower courts further agreed that petitioner attempted to employ its baseless complaint as a device to extract a favorable settlement from Hartmarx in a separate lawsuit that petitioner was doomed to lose. As a result of petitioner's wholesale disregard of Rule 11, respondents were forced to incur substantial legal costs. The Rule 11 award in this case compensates respondents for part of those costs.

There is no reason why this Court should allow petitioner yet another opportunity to attempt to justify its unprofessional conduct, thereby imposing further unnecessary burdens and expense on respondents. As we explain below, the decision of the court of appeals is plainly correct, and further review is unwarranted.

1. Petitioner contends (Pet. 8-12) that the circuits are split on the issue of whether a plaintiff (and its counsel) can avoid Rule 11 sanctions for filing a baseless complaint by voluntarily dismissing the lawsuit pursuant to Fed. R. Civ. P. 41(a)(1)(i). The Second Circuit has held that a voluntary dismissal does divest the district court of jurisdiction to impose Rule 11 sanctions for conduct occurring prior to the dismissal. *Johnson Chem. Co.* v. *Home Care Prods., Inc.*, 823 F.2d 28, 30-31 (2d Cir. 1987).[6] The court below and four other circuits have taken the contrary view. See Pet. App. 6a-10a; *Muthig* v. *Brant Point Nantucket, Inc.*, 838 F.2d 600, 603-604 (1st Cir. 1988); *Greenberg* v. *Sala*, 822 F.2d 882, 885 (9th Cir. 1987); *Szabo Food Serv., Inc.* v. *Canteen Corp.*, 823 F.2d 1073, 1076-1079 (7th Cir. 1987), cert. dismissed, 108 S. Ct. 1101 (1988); *Kurkowski* v. *Volcker*, 819 F.2d 201, 203 (8th Cir. 1987).

The Second Circuit's decision in *Johnson*, however, is plainly distinguishable from the present case because it involved a motion for Rule 11 sanctions filed *after* the case had been voluntarily dismissed. See 823 F.2d at 30. Here, Hartmarx filed its motion *be-*

[6] Contrary to petitioner's contention, the Fifth Circuit has not held that a Rule 41(a)(1)(i) dismissal deprives the district court of jurisdiction to impose Rule 11 sanctions for pre-dismissal violations. *Carter* v. *United States*, 547 F.2d 258 (5th Cir. 1977), merely holds that the courts have no power to decide a case on the merits once a plaintiff has filed a Rule 41(a)(1)(i) notice of dismissal. It says nothing about the court's power to impose Rule 11 sanctions after a dismissal. *Williams* v. *Ezell*, 531 F.2d 1261 (5th Cir. 1976), held that the district court lacked power to award defendants attorney's fees after a voluntary dismissal, but nothing in the opinion indicates that the attorney's fees had been awarded for a Rule 11 violation. In short, the court below was correct in leaving the Fifth Circuit off the list of "circuits that have confronted this issue." Pet. App. 6a.

*fore* Danik's lawsuit was voluntarily dismissed. There may be some basis for a rule that would deprive the district court of jurisdiction over a Rule 11 motion filed after it no longer has jurisdiction over the merits but not over a similar motion filed before it loses jurisdiction over the merits. Indeed, the Eighth Circuit has expressly adopted this distinction. See *Kurkowski*, 819 F.2d at 203 n.7. Because *no* court has yet held that a district court loses jurisdiction in a case like this one, in which the Rule 11 motion preceded the voluntary dismissal, this case does not involve a true conflict.

In any event, certiorari is not warranted even if the Second Circuit is out of step with five of its sister circuits. The Second Circuit decided *Johnson* prior to the First Circuit decision in *Muthig* and the Ninth Circuit decision in *Greenberg* and only eight days after the Seventh Circuit decision in *Szabo*. It therefore did not have the benefit of the thoughtful analyses of those courts. Nor, of course, did it have the benefit of the reasoning of the court below.[7] Lacking any guidance from other courts, the *Johnson* panel assumed without discussion that a voluntary dismissal deprives the district court of "all jurisdiction over the action," and it accordingly concluded that the district court necessarily lacked jurisdiction to impose Rule 11 sanctions even for pre-dismissal conduct.[8] 823 F.2d at 31. If the Second Circuit had had

[7] The Eighth Circuit decided *Kurkowski* a month and a half earlier, but the Second Circuit apparently was unaware of it.

[8] The *Johnson* panel relied principally on the Second Circuit's earlier decision in *Santiago* v. *Victim Servs. Agency*, 753 F.2d 219 (2d Cir. 1985), a case that had nothing to do with Rule 11. In *Santiago*, civil rights plaintiffs voluntarily dismissed their claims under Rule 41(a)(1)(i), and the district court awarded attorney's fees to the defendants pursuant to 42 U.S.C. § 1988, which allows for fee awards to prevailing parties in civil rights actions. 753 F.2d at 220. *Santiago*, therefore, stands solely for the unremarkable proposition that a Rule 41(a)(1)(i) voluntary dismissal precludes a subsequent determination that the defendant is a "prevailing party" for purposes of Section 1988. "The court's inability to award fees under § 1988 does not imply the same treatment of its authority under Rule 11. Neither 'prevailing' on the merits nor an entitlement to 'costs' is a necessary condition of a Rule 11 award." *Szabo*, 823 F.2d at 1077 (discussing *Santiago*).



the benefit of the thorough analyses of the D.C., First, and Seventh Circuits, it undoubtedly would have recognized that its premise was wrong. As the Seventh Circuit observed, " '[j]urisdiction' is an all-purpose word denoting adjudicatory power. A court may have power to do some things but not others, and the use of 'lack of jurisdiction' to describe the things it may not do does not mean that the court is out of business." *Szabo*, 823 F.2d at 1077. Taken to its logical conclusion, the Second Circuit's reasoning would deprive a court of power to punish a blatant contempt that occurs just seconds before a voluntary dismissal, a manifestly absurd result. *Id.* at 1079.

The Second Circuit also failed to take into account the important policies underlying Rule 11. As the court below cogently explained:

> [T]he policies behind Rule 11 do not permit a party to escape its sanction by merely dismissing an unfounded case. The benefits to such a dismissal would accrue to precisely those plaintiffs for which Rule 11 intends "punishment and deterrence," while the costs Rule 11 is designed to

> shift would remain with the defendant upon whom the plaintiff unfairly thrust them.
>
> * * * * *
>
> If a party could immunize itself from a meritorious Rule 11 motion by voluntarily dismissing its case, the risks associated with the filing of an inadequately investigated complaint would be significantly diminished; and as the price of such misconduct fell, of course, its frequency would rise.

Pet. App. 7a-8a (citation omitted).

Nor are there any countervailing policy reasons that might justify the Second Circuit's decision. Petitioner asserts (Pet. 10-11) that allowing courts to impose sanctions after a voluntary dismissal somehow hinders "the unfettered power of a plaintiff" to dismiss its case voluntarily, but it does not explain why that is so. If anything, Rule 11 provides a strong economic incentive for those who file baseless complaints to avail themselves of Rule 41(a)(1)(i): the sooner they terminate their cases and stop imposing litigation costs on their opponents, the lower Rule 11 sanctions are likely to be. See *Szabo*, 823 F.2d at 1079. Petitioner also asserts (Pet. 11), as it did in the court below, that a ruling permitting courts to impose Rule 11 sanctions after a voluntary dismissal will result in a "multiplicity of assaults on Rule 41." The court of appeals rejected this contention, stating: "Appellants do not identify any such possible [attacks], * * * and we can foresee none." Pet. App. 8a. Despite this dismissal of petitioner's unfounded suggestion that Rule 41 is in danger, petitioner to this day fails to provide even one example of how Rule 41 is threatened by the holdings



of the D.C., First, Seventh, Eighth, and Ninth Circuits.

In sum, *Johnson* is an ill-considered and unsupported decision that stands alone. Now that five courts of appeals have rejected it, there is little risk that the circuits will be in disarray.[9] It is more likely that the Second Circuit will revisit the issue in light of the rulings of these other courts. Indeed, that court already has begun the process of disavowing *Johnson* by strongly implying that it is limited to voluntary dismissals under Rule 41(a)(1)(i) and has no bearing on stipulated dismissals under Rule 41(a)(1)(ii). See *Barr Laboratories, Inc.* v. *Abbott Laboratories*, 867 F.2d 743, 747-748 (2d Cir. 1989); *id.* at 749 (Altimari, J., concurring).[10] In *Barr*, the court suggested that a stipulated dismissal might not deprive a court of jurisdiction to impose Rule 11 sanc-

---

[9] Both before and after *Johnson*, courts in the other circuits have shown no inclination to reach a similar result. See, *e.g.*, *Smith* v. *Phillips*, No. 89-6056 (10th Cir. Aug. 2, 1989) (1989 U.S. App. LEXIS 11047) ("A court may have jurisdiction to order Rule 11 sanctions for conduct that occurred before a case was dismissed") (dictum); *Short* v. *Weinrebe*, No. 87-5057 (E.D. Pa. June 30, 1988) (1988 U.S. Dist. LEXIS 6515) ("nowhere in the Rules is it suggested that a voluntary dismissal will terminate a motion for sanctions under Rule 11 or any other Rule"); *Balfour Guthrie, Inc.* v. *Hunter Marine Transp., Inc.*, 118 F.R.D. 66, 78 (M.D. Tenn. 1987) ("Even if voluntary dismissal had occurred, this would not prevent this Court from imposing sanctions under Rule 11") (dictum).

[10] See also *Connecticut* v. *Insurance Co. of America*, 121 F.R.D. 159, 161-162 (D. Conn. 1988) (despite the reasoning in *Johnson*, a court does not lack jurisdiction to impose Rule 11 sanctions on a defendant that has improperly removed a case from state court even though it lacks jurisdiction over the merits of that case).

tions even though it would deprive the court of jurisdiction to decide the merits. The *Barr* panel thus essentially rejected *Johnson*'s assumption that a voluntary dismissal causes a court to lose "all jurisdiction over the action." See Pet. App. 7a. It is apparently only a matter of time before the Second Circuit realizes that *Johnson* is unsound even for voluntary dismissals. Accordingly, there is no need for this Court to intervene now merely to correct an anomalous decision of a circuit that likely will soon correct itself.

2. Petitioner claims (Pet. 12-16) that the decision of the court of appeals conflicts with decisions of the Ninth and Sixth Circuits holding that the standard for determining whether an antitrust complaint has a reasonable basis in fact and law is lower than the standard that would apply in other kinds of cases. Petitioner is mistaken.

The Sixth Circuit case upon which petitioner relies says nothing about whether Rule 11 requires a different standard in antitrust cases. It merely holds that the district court did not abuse its discretion in finding "under the circumstances" that the plaintiff's pre-filing inquiry was reasonable. See *D & M Orthotics & Prosthetics, Inc.* v. *Sisters of Mercy Health Corp.*, No. 88-1945 (6th Cir. June 5, 1989) (1989 U.S. App. LEXIS 7865).

The Ninth Circuit did state that a more lenient standard should apply in those antitrust cases in which "the alleged conspirators control the proof." *Community Elec. Serv., Inc.* v. *National Elec. Contractors Ass'n, Inc.*, 869 F.2d 1235, 1246 (9th Cir. 1989). But this is merely a restatement of the universal rule that courts must consider all of the circumstances in assessing the reasonableness of a pre-



filing inquiry. Far from conflicting with this rule, the court below agreed completely, stating that "disparate access to the information necessary for a putative plaintiff to determine the viability of its prospective cause of action is relevant to the inquiry called for in Rule 11." Pet. App. 12a. It went on to explain—quite sensibly—that "[i]t simply does not follow * * * that a plaintiff can be excused altogether from the need to make a 'reasonable inquiry' into the facts it alleges; rather, the disparate access point goes to the question of what is reasonable given the nature of the information to be obtained." *Ibid.*

Applying these principles, the court of appeals concluded that petitioner's pre-filing inquiry was wholly inadequate, given the information that was readily available, such as a toll-free telephone number that customers could call to learn the names and locations of Hart, Schaffner & Marx and Hickey-Freeman distributors in their area. Pet. App. 12a. Petitioner can quibble with this conclusion, but that quibble has no importance beyond this case. Therefore, there is no reason for this Court to review the issue.

Petitioner further contends (Pet. 16-18) that the circuits have split on the standard for reviewing findings of Rule 11 violations. But the correct standard simply is not relevant to this case. Contrary to petitioner's veiled suggestion (Pet. 16-17), the court of appeals did not state that it was applying an abuse of discretion standard for reviewing the district court's conclusion that petitioner's pre-filing inquiry violated Rule 11. Petitioner's violation of the requirement that complaints have a reasonable factual basis was so clear that the court did not have to rely on an abuse of discretion standard to affirm the district court. The court's ruling makes this plain:

> We find no difficulty in affirming liability under Rule 11 here, as none of the appellants' arguments calls into doubt the "two obvious deficiencies" that the district court identified in their pre-filing investigation of the facts: specifically, appellants failed to engage in any inquiry whatsoever concerning the allegations against [Hickey-Freeman] (as distinguished from [Hart, Schaffner & Marx]), and they claimed a nationwide conspiracy between defendants and selected merchants in each metropolitan area after polling merchants in only four eastern cities. Appellants' account of their efforts does no more than confirm these shortcomings[.] * * * It is impossible to see how "no inquiry" could be a "reasonable inquiry" with regard to the [Hickey-Freeman] allegation or how, without more, an inquiry into four proximate markets could sustain an inference regarding practices elsewhere.

Pet. App. 11a. Because petitioner's investigation would be deemed inadequate under *any* standard of review, this is not an appropriate case for the Court to consider imposing a uniform standard.

3. Petitioner requests (Pet. 14) that this Court decide whether the district court abused its discretion in imposing Rule 11 sanctions in this case. As demonstrated above, there was more than ample evidence in the record to support a finding that petitioner violated Rule 11 by failing to make a reasonable pre-filing inquiry. And, in any event, it is not this Court's normal practice to review findings of fact concurred in by both lower courts. See *NCAA* v. *Board of Regents*, 468 U.S. 85, 98 n.15 (1984).

Similarly, there is no reason for this Court to consider petitioner's argument, relegated to a footnote



(Pet. 15 n.7), that the district court erred in awarding $32,103.78 in sanctions. As petitioner conceded below (Pet. App. 13a), setting the penalty for a Rule 11 violation is a matter committed to the discretion of the district court. Here, the amount awarded was approximately half of the attorney's fees and costs incurred by Hartmarx in defending against petitioner's frivolous class action complaint. Moreover, only $21,402.52 of the sanction was imposed on petitioner, with petitioner's client responsible for the remainder. *Id.* at 29a.

4. Finally, petitioner contends (Pet. 18-20) that the circuits are in disagreement on the issue of whether a Rule 11 award should include legal fees incurred in defending that award on appeal. The D.C., First, and Seventh Circuits have held that appellate fees are incurred "because of" the Rule 11 violation and therefore properly constitute part of any award of attorney's fees. See Pet. App. 14a-16a; *Hays* v. *Sony Corp. of America*, 847 F.2d 412, 419 (7th Cir. 1988); *Muthig*, 838 F.2d at 607. On the other hand, the Fourth and Ninth Circuits have held that appellate fees are recoverable only if the appeal from Rule 11 sanctions is itself frivolous. See *Orange Production Credit Ass'n* v. *Frontline Ventures, Ltd.*, 801 F.2d 1581 (9th Cir. 1986); *Basch* v. *Westinghouse Elec. Corp.*, 777 F.2d 165, 175 (4th Cir. 1985), cert. denied, 476 U.S. 1108 (1986).

As with the first issue raised by petitioner, however, the mere existence of a circuit split does not justify this Court's review. Because the decision of the court of appeals is plainly correct, further review would have no effect on the outcome of this case. Unless an award of attorney's fees is held to include

fees reasonably incurred in defending that award on appeal, litigants that have been victimized by Rule 11 violations will have inadequate incentive to incur the often significant expenditure of filing an appellate brief and undertaking an appellate argument merely to defend what may be a comparatively nominal sanction. Furthermore, the possibility that a Rule 11 violator could erode the opposing party's award of attorney's fees merely by taking an insubstantial yet non-frivolous appeal may act as a disincentive to the filing of a Rule 11 motion in the first place.[11] See *Tamari* v. *Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469, 475 (7th Cir. 1984) ("Requiring a party to bear [appellate] costs [incurred in defending an award of sanctions pursuant to Fed. R. Civ. P. 37] could offset substantially the very award that the party has obtained. This would create a disincentive for seeking sanctions in the first place * * *."). This plainly is contrary to the salutary purposes of the Rule. As the D.C. Circuit said when it first considered this issue four years ago:

> It is very possible that appellate expenses might exceed substantially the sanction in the district court, thus forcing many litigants * * * to conclude that the vindication of the Rule 11 interest is not worth the candle. Unquestionably, this would undermine the purposes behind Rule 11. Rule 11 is specifically designed to deter groundless litigation tactics and stem needless litigation costs to courts and counsel. Given this, we find it hard to believe that the drafters of the

[11] The incentive to pursue insubstantial appeals will be especially strong in cases like this one in which the party that violated Rule 11 is a law firm that can pursue an appeal without incurring out-of-pocket attorney's fees.



> rule intended [litigants] to bear their own appellate costs necessary to correct the error of [their adversaries'] ways.

*Westmoreland* v. *CBS, Inc.*, 770 F.2d 1168, 1179 (D.C. Cir. 1985) (citation omitted). The Seventh Circuit recently made the same point. See *Hays*, 847 F.2d at 419 ("to the extent that a party reasonably incurs substantial fees merely to defend [a Rule 11] award, yet cannot recover its expense, the deterrent and compensatory objectives of awarding sanctions are thwarted").

In contrast with this sound reasoning grounded in the policies of Rule 11, the Fourth and Ninth Circuits have provided no plausible explanation for their holdings. The Ninth Circuit has said only that if it were to accept the argument that has prevailed in the D.C., First, and Seventh Circuits, "every appellee who succeeded in preserving a favorable trial court award in a Rule 11 case would be entitled to fees on appeal regardless of the substance of the appeal. We do not perceive this to be the law." *Orange Production*, 801 F.2d at 1582. The Fourth Circuit has provided even less insight. Without even alluding to Rule 11 or the policies it is designed to further, that court merely rebuffed a request for appellate fees by stating that "[t]he present case * * * does not present an appropriate occasion to penalize counsel for having taken an appeal from the district court's sanction. [The] appeal, although found to be without merit, was not frivolous nor was it interposed to harass defendant or to delay implementation of a valid discovery order." *Basch*, 777 F.2d at 175.

Not only is the result reached by the court below far better reasoned than the result reached by the

Fourth and Ninth Circuits, it is consistent with decisions in analogous contexts. See, *e.g.*, *Tamari*, 729 F.2d at 475 (litigants that successfully defend sanctions awarded pursuant to Fed. R. Civ. P. 37 are entitled to their appellate attorney's fees); *In re Pine*, 705 F.2d 936, 939 (7th Cir. 1983) (award of attorney's fees pursuant to Truth in Lending Act's fee shifting provision includes appellate fees incurred in litigating adequacy of award); *Jones* v. *MacMillan Bloedel Containers, Inc.*, 685 F.2d 236, 239 (8th Cir. 1982) (becoming the ninth court of appeals (of nine to consider the issue) to hold that an award under the Civil Rights Attorney's Fees Award Act (42 U.S.C. § 1988) necessarily includes fees incurred in obtaining and defending the award); *Environmental Defense Fund, Inc.* v. *EPA*, 672 F.2d 42, 62 (D.C. Cir. 1982) (award of attorney's fees pursuant to the Toxic Substance Control Act's fee shifting provision includes fees incurred in preparing and defending the fee petition); see also *Schauffler* v. *United Ass'n of Journeymen & Apprentices*, 246 F.2d 867, 870 (3d Cir. 1957) (district court has discretion to include in penalty for civil contempt the attorney's fees incurred in defending the finding of contempt on appeal).

Thus, as the Seventh Circuit has said:

> Rule 11 is a fee-shifting statute, and a uniform body of law has grown up about such statutes entitling a party who successfully invokes the statute to obtain reasonable fees in defending the award on appeal. There is no reason to complicate this body of law by making an exception for Rule 11 fee-shifting.

*Hays*, 847 F.2d at 419 (citations omitted).



Because the decision of the court below is clearly correct, there is no reason to prolong this attorney's fee litigation by granting review of the appellate fees issue. If the Court wishes to correct the error of the Fourth and Ninth Circuits on this limited question, it can do so in a case arising out of one of those circuits.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD J. FAVRETTO *
MARK W. RYAN
EVAN M. TAGER
*Mayer, Brown & Platt*
*2000 Pennsylvania Avenue, N.W.*
*Washington, D.C. 20006*
*(202) 463-2000*
*Attorneys for Respondents*

September 18, 1989

* Counsel of Record